ETHICAL ISSUES IN ELDER LAW
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I. Overview

A. Areas of elder law covered:
-wills
-powers of attorney
-guardianships/ conservatorships
-estate planning
-consumer issues/theft of identity

B. Issues reviewed:
-communications with third parties
(family members, when and to what extent)
_incapacity and incompetence
(who do you represent what can you disclose)
-general ethical principals for lawyers
(estate planning probate)
(advisory opinions and ethical rules as a guide)

Hypotheticals to discuss

C. Important Ethics Rule:

Nebraska Rule of Professional Responsibility § 3-501.14. Client with diminished capacity.
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial

or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well being. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings -concerning their custody. ***So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.***

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accords the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participated in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters

involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(c).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some

circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by attorney client privilege.
Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance
[9] In an emergency where the health, safety or a financial interest of a person with seriously
diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency
should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

II. Wills

HYPOTHETICAL: You as a lawyer receive a call from a woman explaining that she wants to make an appointment with you for her elderly parent to draft a will. The adult child of the elderly client drives her to your office and proceeds to head back to your conference room with her mom for your consultation.

-Who is your client
-to what extent do you allow adult child or other person in conference
-who does the talking
-3rd person such as kid of senior asks for copy of will before or after it is signed
-undo influence

good practice is to obtain consent of the senior to allow communication with family member

-establish enough competency to make a will

Advisory opinions pertaining to Wills

Nebraska Advisory Opinions
1981
OPINION NO. 81-12
Ethics Opinions -- NSBA
IT IS IMPROPER FOR AN ATTORNEY TO ACCEPT CLIENTS REFERRED BY A SAVINGS AND LOAN ASSOCIATION FOR THE PURPOSE OF PROVIDING THE CLIENT WITH A FREE WILL.

FACTUAL SITUATION
A savings and loan association operates a club which offers membership to any depositor with a balance in excess of a certain amount. The club proposes to approach attorneys who would be interested in providing wills free of charge to its members. The club's involvement would basically he limited to approaching and identifying attorneys who would be interested in engaging in this program and subsequently notifying its members through its regular newsletter of the availability of the service. Presumably, an attorney might be interested in offering this service in the expectation of establishing client contacts or the possibility of representing the estate in any subsequent probate.

QUESTION PRESENTED
May an attorney accept clients referred by a savings and loan association for the purpose of providing the client with a free will?

DISCUSSION
EC 2-8 states:
"Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties - relatives, friends, acquaintances, business associates, or other lawyers. A

layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations."

DR 2-103 provides in pertinent part:

"Recommendation of Professional Employment

"(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner of himself, his partner, or associate to a layman who has not sought his advice regarding employment of a lawyer.

"(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

"(C) A lawyer shall not request a person or organization to recommend or promote the use of his service or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that

"(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

"(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client."

The Committee on Ethics and Professional Responsibility of the American Bar Association has issued several informal opinions concerning plans for the referral of prospective clients to lawyers. These opinions illustrate some of the ethical problems arising in such situations.

In informal opinion No. 970, dated November 23, 1966, the ABA Committee ruled that an attorney representing a labor union could not write wills for members of the union without charging for that service. The Committee stated, however, that it would be proper for the union's attorney to draft wills or provide other legal services to union members if they came to him voluntarily, in the same manner as other clients do, and contracted directly with him for his legal services.

In informal opinion No. 1288, dated June 17, 1974, the ABA Committee ruled that it would not be proper for a lawyer to prepare wills for members of the congregation of a church, with the fee for the lawyer's services being paid to the church as a donation. The Committee stated that this arrangement would violate DR 2-103(B) in that the lawyer would be directing the payment of his fee to the church in return for the referral of the client.

In informal opinion No. 1313, dated January 27, 1975, the ABA Committee ruled that a law firm could participate in an arrangement under which a credit union would refer its

members to the law firm for legal services. Payment for the legal services would be made by the individual members of the credit union on the basis of a schedule of charges that the law firm would submit to the credit union for its approval.
In informal opinion No. 1339, dated August 25, 1975, the ABA Committee ruled that it would be proper for attorneys to provide legal services free of charge to the widows and families of policemen and firemen killed in the line of duty. The referral of prospective clients to attorneys was done by an organization created for the purpose of providing financial and other assistance to the widows and families of deceased policemen and firemen. The ABA Committee ruled that the referring organization came within the exemption contained in DR 2-103 (D) (4) .

In informal opinion No. 1352, dated October 31, 1975, the ABA Committee ruled that it would be proper for an organization consisting of a group of lay persons interested in consumer protection to refer prospective clients to lawyers qualified in the field of consumer law and willing to charge fees commensurate with the client's ability to pay. The Committee stated that the fact that the organization making the referrals was a non-profit organization eliminated any potential violation of DR 2-103(C).

In informal opinion No. 1360, dated April 14, 1976, the ABA Committee ruled that it would be proper for a non-profit organization to refer artists and art organizations to lawyers willing to provide legal services free of charge to indigent artists. The Committee stated that the proposed plan did not violate DR 2-101 or Dr 2-103(D)(4).

In informal opinion No. 1438, dated June 6, 1979, the ABA Committee ruled that it would be proper for an employee organization to refer members of the organization to a particular law firm, which would be compensated on an individual basis by the person utilizing the law firm's services. The Committee stated that the proposed referral plan did not violate any provision of the Model Code of Professional Responsibility.

In addition to the foregoing opinions of the ABA Committee, two prior opinions of this committee are of some interest in connection with the question under consideration. They are opinion No. 73-3 and opinion No. 76-12.

III. Powers of attorney

HYPOTHETICAL: Adult child of one of your clients calls to request that you draft a power of attorney for the elderly client as she is becoming forgetful, etc.

-who do you represent
-to what extent can you communicate with both of them
-from whom who can you collect your fee

§ 3-501.6. Confidentiality of information.
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

(c) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for the purposes of the application of Rule 1.6.

Ethics advisory opinions
-not much specifically on power of attorney issues from Nebraska but a good source of guidance is ABA/BNI Lawyer's manual

IV. Probate
-According to the office of Counsel of Discipline
2010 Disciplinary report 5% of total number of grievances in area of probate/estate

To what extent can you reveal secrets of decedent
What obligation do you have to the heirs
See the Nebraska Probate Code

V. Incapacity/Incompetence

HYPOTHEICAL: While consulting with a long-standing elderly client, it becomes apparent to you that he is incapacitated. What do you do.

See Ethical rule **§ 3-501.14** above

Nebraska Advisory Opinions:

ETH 09-09.
2009
A LAWYER MAY NOT REVEAL INFORMATION CONCERNING A LIFE-THREATENING OR DEBILITATING HEALTH CONDITION OF A CLIENT TO AN ADVERSE PARTY OR ATTORNEY IN THE ABSENCE OF INFORMED CONSENT BY THE CLIENT OR VALID COURT ORDER WHERE THE CLIENT'S INTERESTS HAVE BEEN PROTECTED WITHIN THE BOUNDS OF THE LAW.

QUESTION PRESENTED
Whether a lawyer has an ethical obligation to disclose a life-threatening or debilitating health condition of a client who has been designated as a witness, but whose medical condition is not at issue in the case.

FACTS
An attorney represented a corporate landlord in a commercial lease dispute whereby the sole shareholder of the corporate landlord was joined as a third party defendant in his individual capacity ("Client"). During the course of litigation, plaintiffs counsel was notified that his Client was diagnosed with cancer and approximately seven months later, the Client was admitted to hospice care. At the time of the inquiry, the Client had not been provided with a time-frame as to his life expectancy.
In response to discovery requests, the Client had been identified as a potential witness. Opposing counsel subsequently expressed an interest in deposing the Client, without any apparent request as to a date for the deposition.
The Client instructed counsel to refrain from disclosing his health condition to the opposing party out of concern that the disclosure would weaken their negotiation posture and that he would perform poorly in the deposition. Opposing counsel had not made any prior inquiry concerning the health condition of the Client nor was the health condition of the Client an apparent issue in the underlying litigation.
The attorney expresses concern that if the Client's adverse health condition is not disclosed, then the opposing party may lose the opportunity to depose the Client and preserve his testimony for trial. The issue in this case is whether plaintiffs counsel has any affirmative duty to reveal the personal health information over the objection of his client.

APPLICABLE RULES OF PROFESSIONAL CONDUCT
RULE 1.6 CONFIDENTIALITY OF INFORMATION.

(a)A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b)A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

COMMENT (Applicable Sections):

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the nature of the future crime, the lawyer's own involvement in

the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(c), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A lawyer shall not

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Subparagraph (e) and (f) omitted.

COMMENT (Applicable Sections):

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altrered concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a)make a false statement of material fact or law to a third person; or

(b)fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT (Applicable Section):

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A

misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

DISCUSSION

/. Introduction

This query underscores tire competing ethical considerations associated with Rule 1.6, Confidentiality of Information and Rule 3.4, Fairness to Opposing Party and Counsel.

The obligation of attorneys to maintain the confidences of their clients evolved from the development of the attorney-client privilege to encompass a much broader scope of protected information in order to foster free and open communications between lawyers and their clients. Comment [2] to Rule 1.6 states that the duty "is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Consequently, Rule 1.6 prohibits a lawyer from disclosing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosures are permitted under one of the exceptions enumerated under Rule 1.6. The only exception that would be applicable to this analysis is Rule 1.6(b) which permits the revelation of information relating to the representation of a client to the extent the lawyer reasonably believes is necessary to comply with other law or a court order.

The broad application of the confidentiality rule is further underscored under Comment 3 to Rule 1.6 which provides that it "applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."

If a client has expressly or impliedly authorized the release of confidential information, then disclosure must be no greater than the express or implied authorization. In the absence of informed consent of the client, the lawyer must pursue all non-frivolous avenues in order to protect the client's confidential information including the pursuit of an appeal if authorized by the client following consultation concerning that alternative.

The importance of protecting a client's confidential information must be balanced with Rule 3.4 which prohibits an attorney from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or concealing evidence, among other tactics. Clearly, a lawyer may not protect the confidential information of the lawyer's client by engaging in acts of misrepresentation concerning the confidential information or from concealing facts which may create a false impression to opposing counsel as to the existence of confidential information as further addressed below.

//. Non-Compulsory Disclosure of Information

In the present case, the client made it clear that his cancerous health condition was personal, confidential and should not be disclosed. The confidential information was within the representation of the client because the client determined that it was important

enough to share with his attorney and in doing so, expressed concern as to his ability to endure the mental and physical stress of a deposition as well as his perception that the knowledge of his tenuous condition by opposing counsel would impair his negotiating position. The attorney was therefore duty -bound to protect the confidential information of the client in the absence of a law compelling disclosure or court order.

As the health of the client does not appear to have been a direct issue in the case, the committee is not aware of any rule which would create an affirmative duty by an attorney to volunteer confidential health information about the client that could have a bearing upon the client's availability for deposition or trial in the absence of a direct inquiry by opposing counsel. Comment 1 to Rule 4.1 provides that "a lawyer is required to be truth and when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." If an inquiry is made that that would lead to the disclosure of the health conditions, then the lawyer is duty bound to protect the information by declination, objection or by initiating or defending an adversary proceeding.

Lawyers must be mindful that a "[misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer Knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Comment 1, Rule 4.1. In Nebraska State Bar Association v. Addison, 226 Neb. 585,412 N.W.2d 855 (1987), an attorney was suspended for obtaining a release of a hospital lien in exchange for a portion of a negotiated settlement under two insurance policies without disclosing the existence of a third policy to the hospital claim representative. The attorney became aware that the representative was under a false impression as to the existence of only two policies and violated former DR7-102(a)(5) by failing to correct the false impression. While opposing counsel in this case was not under any false impression concerning the availability of the client as a witness or as to any matters concerning his health, the Addison case illustrates the delicate balancing of the confidences of a client against justice and fair play.
To be sure, a client, lay witness or expert witness may become unavailable at any time for a variety of reasons, including those resulting from adverse health conditions. Both the Nebraska and Federal Rules of Discovery contain the tools necessary for attorneys to, among other things, preserve the testimony of witnesses and to secure information which may or may not be deemed confidential. It is the duty of all attorneys, pursuant to Rule 1.1, to competently pursue the interests of their clients through the use of such tools. The Committee believes it would create an unreasonable burden to require lawyers to disclose information that has not been sought by opposing counsel that is not otherwise mandated by law, such as, for example, the initial disclosures required under FRCP 26.

///. Compulsory Requests
The Committee believes it is important to distinguish between the unpermitted disclosure of confidential information of a client that has not been sought by the opposing party as opposed to the unpermitted disclosure of confidential information that has been sought through direct inquiry by opposing counsel or by compulsory means. Under such circumstances, an attorney remains duty-bound to seek procedural protection of the

confidential information by objecting to the discovery request or by way of a motion for protective order. The Committee believes the same to be true with respect to informal requests of confidential information without the express or implied consent of the client by either declining to provide the confidential information or by seeking an appropriate protective order from the court.

In the foregoing regard, the Philadelphia Bar Association Professional Guidance Committee, Opinion 95-19 (1996), opined that the proper procedure for an HIV positive client who did not want his condition revealed in response to medical history discovery requests in a personal injury case should either object to the discovery requests or seek appropriate protective orders from the court. In Pennsylvania Bar Association Ethics Committee, Opinion 96-178, the committee opined that a lawyer for a plaintiff in an automobile accident case must disclose, in response to the defendant's interrogatories, the fact that the plaintiff has contracted non-Hodgkins lymphoma since the accident occurred. If the client's medical condition is in issue and the client refuses to allow the confidential information to be disclosed, the attorney should again determine whether there are any meritorious procedural protections available to limit the nature or extent of the disclosure and pursue such relief through proper objection or motion. In the event the client refuses to consent to the production of the confidential information in the face of a clear rule or court order, then the attorney should withdraw from further representation in the case. See also. Opinion 2006-10 issued by the North Carolina State Bar, wherein it was stated "A lawyer must exercise reasonable care to protect the confidentiality of a client's health information gathered, for example, in connection with a medical malpractice or personal injury case. It is encouraged to handle the health information of third parties with the same care as that of clients." In such cases, the interests of Rule 1.6 and 3.4 are balanced because the confidential information of the client is protected while the opposing party is given a fair opportunity to discover the existence of potential relevant information and an opportunity to compel the disclosure of such information through an adversary proceeding.

CONCLUSION

A lawyer may not reveal information concerning a life-threatening or debilitating health condition of a client to an adverse party or attorney in the absence of informed consent by the client or an order to comply with a valid court order or compulsory process where the client's interests have been protected within the bounds of the law.

Nebraska Advisory Opinions
1991.
ETH 91-4.

IF AN ATTORNEY REASONABLY BELIEVES A CLIENT TO BE MENTALLY INCOMPETENT, THE ATTORNEY MAY DISCLOSE CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS TO THE EXTENT NECESSARY TO PROTECT THE BEST INTERESTS OF THE CLIENT.

FACTS

You represent an elderly man who is recently divorced. Your client owns the apartment building in which he resides but he is unable to make the monthly payments on the building. The bank which holds the deed of trust scheduled the property to be sold at auction. On the eve of the sale, you filed a Chapter 13 Bankruptcy on behalf of your client.

The filing of the bankruptcy petition stopped the sale. The Chapter 13 Plan provides that the client would attempt to sell the property by private sale. A buyer has offered to buy the client's building for approximately $30,000 in excess of the encumbrances. Your client refuses to accept the offer.

You now believe your client to be incompetent. He denies that he has filed a Chapter 13 bankruptcy and refuses to cooperate with the proceedings. For this reason, the bankruptcy will soon be dismissed.

You have been unable to convince your client that it would be in his best interests to sell the property. He is unwilling to waive the attorney-client privilege which would permit you to discuss the situation with third parties.

You are concerned that if you take no action your client's property will eventually be sold at auction and the client will not receive any of the proceeds of the sale. You would like to file a report with Adult Protective Services and ask the committee whether the filing of such a report would violate the Code of Professional Responsibility.

APPLICABLE CODE PROVISIONS

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation or wrongful conduct.

EC 7-12. Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

DISCUSSION

The Committee has not previously addressed the issue raised by your request. Other jurisdictions, however, have considered similar factual situations.

In Florida Advisory Opinion 85-4, Law. Man. Prof. Conduct, 801:2504, an attorney was advised that if he believed his client was "showing signs" of mental illness he "should do what he can do" to protect the client's interests. This may include seeking the appointment of a legal guardian for his client even if the client objects. In similar fashion, the New York City Bar Association concluded in Opinion 83-1, Law. Man. Prof. Conduct, 801:6343, that a lawyer who had reason to question his client's ability to make rational decisions could "seek the appointment of a representative who would advise the lawyer how to proceed with the client's case".

In Informal Opinion 83-1500, the American Bar Association opined that an attorney may disclose to a third person a client's intention to commit suicide pursuant to DR 4-101 (C) (3) even if suicide is not a crime in that particular jurisdiction. In light of EC 7-12, the ABA reasoned that if a lawyer justifiably concludes that a client is unable to make a considered judgment the lawyer "should be permitted to disclose the information as a last resort when the lawyer's efforts to counsel the client have apparently failed."

ABA Informal Opinion 89-1530 concluded that an attorney with a reasonable belief that a client was incompetent could disclose information relating to the representation to the extent necessary to serve the client's best interests. The Code of Professional Responsibility contemplates a competent client according to the opinion. When a client is unable to make decisions "the lawyer has no alternative but to act in the client's interests as the lawyer can best determine them without client input."

CONCLUSION

It is the opinion of the Committee that if an attorney reasonably believes a client to be mentally incompetent, the attorney may disclose confidential attorney-client communications to the extent necessary to protect the best interests of the client.

VI. Guardianship/ Conservatorship

Hypothetical: you represented the elderly person before say a husband and wife and one of them comes to you and says the other needs a guardian, but the person in need of guardian does not want one? Should you/ can you represent either one of them.

§ 3-501.7. Conflict of interest; current clients.
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

-conflict of interest?

Other issues:
The person alleged to be incompetent has the right to ask for a lawyer under guardianship law.

Funds: A guardian/conservator cannot commingle funds. Cannot pay themselves or their lawyer from the funds of the incapacitated person without court approval

Advisory opinions :
Nebraska Advisory Opinions

1971
OPINION NO. 71-5
Ethics Opinions -- NSBA
The inquirer raises the following problem:
"I had represented an elderly lady in a number of minor legal matters. As she became less able to handle her own affairs, a daughter petitioned the County Court to have a guardianship established naming a bank as guardian of the property and an individual as guardian of the person. I acted as attorney in the establishment of the guardianship. This same daughter has now retained other counsel, and instigated a proceeding to remove the guardian of the person alleging he is unfit to serve in that capacity.

"If I now represent the interests of the guardian of the person in the removal proceedings, have I placed myself in a position of having a conflict of interest? It should be born (sic) in mind that all parties are aware of my representation of the ward before the establishment of the guardianship, as well as being attorney for the guardianship to date."
The facts stated in the inquiry indicate that this is not a guardianship of a minor, Chapter 38, Article 1, R.R.S. 1943, nor a spendthrift guardianship, Chapter 38, Article 3, R.R.S. 1943, but, rather, the guardianship of a mentally ill or mentally incompetent person, Chapter 38, Article 2, R.R.S. 1943, as to whom there is guardianship of the estate and the person.

The attorney had represented the ward in a number of legal matters before the guardianship, she became unable to manage her affairs, her daughter petitioned the county court for the appointment of a guardian, and separate guardians for the ward's estate and person were appointed. The attorney represented the daughter in the guardianship proceedings. All parties are aware of the attorney's representation of the ward before guardianship, as well as his representation of the guardians since that time. The daughter has now employed other counsel in a proceeding to remove the guardian of the person because of alleged "unfitness".

Within the foregoing facts, the following question is asked:
If I now represent the interests of the guardian of the person in the removal proceedings, have I placed myself in a position of having a conflict of interest?
Although a proceeding for the appointment of a guardian in inquisitorial in nature, rather than adversary, there is, even so, a hostility to freedom, however benevolent the move, Hall v. Hall, 122 Neb. 228, 240. The proceeding for the removal of the guardian of the person appears to be adversary, inasmuch as the statutory grounds for the removal of a guardian, Section 38-507, R.R.S. 1943, are:

1. That he is insane;
2. That he is otherwise incapable of discharging his trust; and
3. That he is evidently unsuitable.

Accordingly, if the attorney attempted the employment he would appear in opposition to a former client in an adversary proceeding involving one facet of his former employment. There may, or may not be, a conflict of interest in fact, but at this time this can not be predicted. It may bear the indicia of impropriety, however.

However, I am of the opinion that the attorney should decline the employment for a reason which is to me more compelling.

The ward was his client before the guardianship and it may be, and should be, presumed that he served her best interests in the guardianship proceeding. Since that tie she could neither employ nor discharge him. Her best interests may, or may not be, best served by the removal of the guardian of the person. This is an issue of fact which is not resolved at this time. If he represents the guardian of the person and resists the removal proceedings he may be rendering a disservice to the ward. He should not prejudge the matter.
I conclude that there may a conflict of interest and that there will be an appearance of impropriety if the employment is accepted.

The proposed employment falls within the prohibition of EC 9-6, of the Code of Professional Responsibility, which in part provides:
Every lawyer . . . [should] . . . strive to avoid not only professional impropriety but also the appearance of impropriety.
In State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, the court said (p. 93):
. . . As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134:
"An attorney should not only avoid impropriety but should avoid the appearance of impropriety." . . .

In Wise, Legal Ethics, Second Edition, 1970, it is said (pp. 256, 273):
. . . [I]f there is the slightest doubt as to whether a proposed representation involves a conflict of interest between two clients, or between a new client and a former client, or may encompass the use of special knowledge or information obtained through service of another client or while in public office, or necessitates a conflict between the interests of a present or former client and those of the attorney, the doubt can best be resolved by Matthew VI, 24: "No man can serve two masters." . . .
* * *
As was said at the outset "No man can serve two masters". If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict between the interests of any client and that of the attorney, or may require the use of information obtained through the service of another client, the employment should be refused.

This opinion is limited to the facts presented here. The ward never discharged the attorney and is now unable to do so. The daughter of the ward was the petitioner in the guardianship proceeding and is now the petitioner in the removal proceeding. The present issue was one of the issues in the guardianship proceedings. The guardian of the person may in fact be insane, otherwise incapable of discharging his trust, or evidently

unsuitable. If the attorney accepts the employment, he must zealously represent the guardian, Canon 7, Code of Professional Responsibility, which might be a disservice to the ward who never discharged him.

There appear to be substantial reasons why there will be an appearance of impropriety if the employment is accepted, and, indeed, something more than the "slightest doubt" of which Wise speaks.

VII: Estate Planning

-Most ethical advisory opinions in this area pertain to solicitation of prospective clients:

Nebraska Advisory Opinions
1991.
ETH 91-1.

A SALARIED ATTORNEY-EMPLOYEE OF A CORPORATION (WHICH IS NOT A NEBRASKA PROFESSIONAL CORPORATION ENGAGED IN THE PRACTICE OF LAW) WHICH PROVIDES FINANCIAL AND ESTATE PLANNING SERVICES OR PRODUCTS MAY NOT ETHICALLY PREPARE TRUST AGREEMENTS, WILLS OR RELATED ESTATE PLANNING DOCUMENTS FOR THE CORPORATION'S CUSTOMERS NOR FOR CUSTOMERS WHICH MAY BE REFERRED TO THE CORPORATION BY INDEPENDENT INSURANCE AGENTS OR PROVIDERS OF OTHER FINANCIAL PRODUCTS SUCH AS MUTUAL FUNDS. THE SAME RULE WOULD APPLY AS WELL TO PARTNERS OR EMPLOYEES OF A PARTNERSHIP THAT IS NOT ENGAGED EXCLUSIVELY IN THE PRACTICE OF LAW WHICH PROVIDE SUCH SERVICES.

FACTS

A corporation (which is not a Nebraska professional corporation engaged in the practice of law) proposes to provide financial and estate planning services and products to its customers. The corporation also intends to contract with independent insurance agents or providers of other financial products such as mutual funds, who would then contact their client base to discuss inter vivos trusts, Wills or related estate planning documents.

If a client expresses interest in an inter vivos trust, or other such document, information provided by the client would be forwarded to the salaried attorney-employee of the corporation. The attorney would then prepare the appropriate documents, with or without contacting the client.

QUESTION PRESENTED

May a salaried attorney-employee of a corporation (which is not a Nebraska professional corporation engaged in the practice of law) which provides financial and estate planning services ethically prepare trust agreements, wills or related estate planning documents for the corporation's customers or for customers referred to the corporation by independent insurance agents or providers of other financial instruments such as mutual funds?

APPLICABLE CODE PROVISIONS

DR 1-102 Misconduct.

(A) A lawyer shall not:

(2) Circumvent a Disciplinary Rule through actions of another.

DR 2-103 Recommendation of Professional Employment.

(A) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by these rules and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

DR 2-104 Personal Contact with Prospective Clients.

(A) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirement of paragraph (b):

(1) If the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

DR 3-101 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

DR 3-102 Dividing of Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR 3-103 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

EC-3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will

be or reasonably may be affected by his own financial, business, property, or personal interests.

DISCUSSION

The creation, marketing and sale of trust documents by non-lawyers constitutes the unauthorized practice of law, contrary to Neb. Rev. Stat. § 7-101 (Reissue 1987); People v. Macy, 789 P.2d 188 (Colo. 1990). Attorneys may not aid a non-lawyer (the corporation) in the unauthorized practice of law. DR 3-101 (A). Attorneys may not practice law in association with non-lawyers. EC 3-8. An attorney-employee of a business corporation which provides financial and estate planning services may not, therefore, render legal advice to or prepare trust or estate planning documents for the corporation's customers on behalf of the corporation, nor may the corporation collect money for legal services rendered by the lawyer. Formal Tennessee Ethics Opinion No. 83-F-44, summarized in ABA/BNA Lawyers' Manual on Professional Conduct 801:8108; Formal Tennessee Ethics Opinion No. 84-F-74, summarized in ABA/BNA Lawyers' Manual on Professional Conduct 801:8113-8114; Dallas Bar Association Ethics Committee Opinions No. 1982-3, summarized in ABA/BNA Lawyers' Manual on Professional Conduct 801:8405; and Ethics Committee of the State Bar of South Dakota Opinion No. 88-4, summarized in ABA/BNA Lawyers' Manual on Professional Conduct 901:8001. A corporation which reaps a benefit or profit from an employee-attorney who provides legal services to third parties is sharing legal fees with an attorney. Such an arrangement is prohibited by DR 3-102 (A).

This Committee has previously opined that a lawyer may not contract with independent insurance agents or others for referrals. Nebraska State Bar Association Advisory Opinion 81-10. The reasons are twofold. The Nebraska Supreme Court Disciplinary Rules specifically prohibit an attorney from compensating anyone for recommending the attorney's services. DR 2-103(A). If the corporation for which an attorney worked, contracted with insurance agents and financial advisors for client referrals, the attorney would be violating the rules if he provided his services to the referred clients. The Nebraska Supreme Court Disciplinary Rules also specifically prohibit in-person solicitation of prospective clients. DR 2-104(A). The present referral arrangement as proposed by the corporation would involve personal solicitation. Even if done by the insurance agent or financial planner, the attorney would knowingly be violating DR 2-104(A) through the actions of others. This is also a violation DR 1-102(A).

Finally, a lawyer has an obligation to give independent professional advice to a client. The attorney's judgment must not be restricted by the attorney's financial, business, property or personal interests. DR 5-101 (A). An attorney who provides legal services to third persons on behalf of his corporate employer is under conflicting pressures to honor the pecuniary needs and concerns of the corporation in obtaining business, and to honor the legal needs and concerns of the third-party client. Because of this conflict, a staff attorney for a corporation which provides financial and estate planning services should not render legal advice to the corporation's customer. See, Nebraska State Bar Association Advisory Opinion 81-11.

CONCLUSION

A salaried attorney-employee of a corporation (which is not a Nebraska professional corporation engaged in the practice of law) which provides financial and estate planning services or products may not ethically prepare trust documents, wills or related estate planning documents for the corporation's customers nor for customers referred to the corporation by independent insurance agents or financial planners. The same rule would apply as well to lawyers who are partners or employees of a Partnership that is not engaged exclusively in the practice of law.

Nebraska Advisory Opinions
1981.
ETH 81-10.

AN ATTORNEY MAY NOT DIRECTLY SOLICIT CLIENTS, LIFE INSURANCE AGENTS, OTHER NON-LAWYERS OR OTHER LAWYERS IN ORDER TO HAVE THEM INTRODUCE CLIENTS TO THE ATTORNEY FOR THE PURPOSE OF RETIREMENT OR ESTATE PLANNING. AN ATTORNEY MAY NOT AVOID THE PROHIBITION AGAINST SOLICITATION BY DELEGATING A PORTION OF THE LEGAL WORK ENTAILED IN RETIREMENT AND/OR ESTATE PLANNING WHEN THE ATTORNEY CONTINUES TO ADVISE HIS OR HER CLIENTS AS TO THE TAX AND NON-TAX RAMIFICATIONS OF ADOPTION AND IMPLEMENTATION OF QUALIFIED RETIREMENT PLANS OR ESTATE PLANS. SUCH WORK WOULD INVOLVE THE PRACTICE OF LAW AND THEREFORE SHOULD NOT BE PERFORMED BY AN ATTORNEY ON INACTIVE PRACTICE STATUS.

FACTUAL SITUATION

An attorney would like to directly solicit retirement and/or estate planning business from individual clients or contact other attorneys life insurance agents, or other parties in order to have them introduce clients to the attorney. If a life insurance agent recommended the attorney for estate planning purposes, the attorney would advise the client to purchase insurance as part of the client's estate plan.

The attorney would be willing to delegate the drafting and representation functions entailed in the retirement and estate planning to independent practicing attorneys in an attempt to remove the conduct of the business from the practice of law. The attorney would continue, however, to advise the client as to the tax and non-tax ramifications of adoption and implementation of qualified retirement and/or estate plans.

QUESTION PRESENTED

May an attorney directly solicit clients, life insurance agents or other attorneys in order to have them introduce clients to an attorney for the purpose of retirement or estate planning.

Would the delegation of the drafting and representation functions entailed in the retirement and estate planning by the above attorney to independent practicing attorneys remove the conduct of the business from the practice of law and thereby allow the attorney to solicit clients.

Would it make any difference if the attorney involved was on inactive status rather than a full time, practicing attorney.

DISCUSSION

DR 2-103 provides:

Recommendation of Professional Employment

(A) A lawyer shall not, except as authorized in DR 2-101 (B), recommend employment as a private practitioner, of himself, his partner, or associate to a layman who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103 (D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D) (1) through (4) and may perform legal service for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

The above Disciplinary Rule is quite explicit in prohibiting soliciting by an attorney. DR 2-103 (B) prohibits an attorney from compensating an insurance agent for the referral of a client by advising the client to purchase insurance from the agent. DR 2-103 (C) curtails a lawyer from requesting other lawyers to recommend or promote his employment. The use of a non-lawyer to solicit business for the attorney would also violate DR 2-103 (C).

EC3-5 provides:

".Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client...".

EC3-1 provides:

"The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the

inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession."

From the present factual situation, it appears that the attorney, even after delegating the drafting and representation functions of the retirement and/or estate planning, would still be engaged in the practice of law. Advising a client as to the tax and non-tax ramifications of the adoption of a retirement and/or estate plan would call upon the attorney to exercise his or her legal expertise. Accordingly, an attorney would be unable to avoid an ethical violation for solicitation by delegating the drafting and representation functions of estate or retirement planning if the attorney continued to advise a client as to the proposed adoption and implementation of a qualified retirement plan or estate plan. Likewise, the fact that the attorney was on an inactive status would not avoid the ethical violation.

Nebraska Advisory Opinions
2004.
ETH 04-2.

(Formal Opinion 75-11 is withdrawn)
[Note: This opinion was originally issued by the Committee on September 23, 1997, as Advisory Opinion 1803. The Committee has now determined that this opinion should be published as a Formal Opinion.]

ISSUES ADDRESSED
I. WHETHER A LAWYER VIOLATES THE CODE OF PROFESSIONAL RESPONSIBILITY BY PARTICIPATING IN PUBLIC SEMINARS SPONSORED BY CHARITABLE ORGANIZATIONS OR FOR-PROFIT ENTITIES WHERE THE PURPOSE IS TO BOTH EDUCATE THE PUBLIC AND GENERATE BUSINESS FOR THE SPONSORING ORGANIZATION AND THE LAWYER.

II. WHETHER A LAWYER VIOLATES THE CODE OF PROFESSIONAL RESPONSIBILITY BY SOCIALLY ENTERTAINING NON-LAWYERS AND LAWYERS FOR THE PURPOSE OF GENERATING CLIENTS AND CLIENT REFERRALS FOR ESTATE PLANNING SERVICES.
STATEMENT OF FACTS
Nebraska lawyers are often asked to participate in seminars sponsored by charitable organizations and for-profit entities such as banks, investment advisors and life insurance companies. The purposes of the seminars are normally two: to educate the public and to interest the public in purchasing the product or services of the sponsor. Lawyers are not compensated for their participation. The motivation for participation may be any number of things including public service, marketing efforts or pursuant to the request of a client.
A second situation presented is social entertainment by lawyers of others, including non-lawyers and lawyers, for the purpose of generating client business or referrals of clients for the lawyers estate planning services.

APPLICABLE CODE PROVISIONS

Canon 2: A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

EC 2-2: The legal profession should assist lay persons to recognize legal problems because such may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning legal system with particular reference to legal problems that frequently arise. Preparation of advertisement and professional articles for lay publications and participation in seminars, lectures and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers.

EC 2-8: Selection of a lawyer by a lay person should be made on an informed basis. A lay person is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his or her employment. A lawyer should not compensate another person for recommending him or her, for influencing a perspective client to employ him or her or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, television or radio, should be formulated to convey only information that is necessary to make an appropriate selection.

DR 2-103: Recommendation of Professional Employment.

(A) A lawyer shall not give anything of value to a person for recommending a lawyers services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by these rules and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

DR 2-104: Personal Contact with Perspective Clients.

(A) A lawyer may initiate personal contact with a perspective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (8):

(1) If the perspective client is a close friend, relative, former client, or one whom the lawyer reasonably believes to be a client,

(2) Under the auspices of a public or charitable legal services organization; or

(3) Under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(B) A lawyer shall not contact, or send a written communication to, a perspective client for the purpose of obtaining professional employment if,

(1) . . .

(2) The person has made known to the lawyer a desire not to receive communications from the lawyer, or

(3) The communication involves coercion, duress or harassment.

Canon 3: A lawyer should assist in preventing the unauthorized practice of law.

EC 3-3: A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. The disciplinary rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his or her judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his or her client.
Canon 5: A lawyer should exercise independent professional judgment on behalf of a client.
EC 5-1: The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the lawyer's client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to his or her client.

EC 5-21: The obligation of a lawyer to exercise professional judgment solely on behalf of his or her client requires that the lawyer disregard the desires of others that might impair the lawyer's free judgment. The desires of a third person will seldom adversely affect the lawyer unless that person is in a position to exert strong economic, political or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his or her client; and if the lawyer or client believes that the effectiveness of his or her representative has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

DR 5-101: Refusing employment when the interests of the lawyer may impair the lawyer's independent professional judgment.
(A) Except with the consent of his or her client after full disclosure, the lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

DR 5-107: Avoiding influence by others than the client.
(A) Except with the consent of his or her client after full disclosure, a lawyer shall not:
(1) Accept compensation for the lawyer's legal services from one other than the client.
(2) Accept from one other than the client anything of value related to the lawyer's representation of or employment by the client.
(B) A lawyer shall not permit a person who recommends, employs or pays him or her to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
Canon 9: A lawyer should avoid even the appearance of professional impropriety.

DISCUSSION
The Nebraska position on the issues presented was developed some years ago in Advisory Opinions 75-11, 81-10 and 88-4. Under these opinions, it would clearly be

unethical and in violation of the Code of Professional Responsibility for either of the activities described above. Your letter suggests that the 1975 and 1981 opinions predate the general acceptance of attorney advertising and should, therefore, be reanalyzed. We agree that another look is appropriate. In doing so, we have reviewed unpublished opinions of this Committee as well as opinions from other states.

A 1993 opinion of this Committee (#1243) responded to an attorney who proposed putting on a public seminar regarding the rights of individuals involved in accidents. The lawyer proposed to specifically address the issue of solicitation of clients by making it clear to those attending the seminar that it was not intended as a solicitation of business but rather a dissemination of information to the public. The opinion referenced those of several other states and the significant disparity of authority resulting. This Committee concluded that it would not issue any blanket endorsement of participation in such seminars but that participation in educational activities is acceptable when the motivation is to educate the public. Thus the conclusions of Opinions 75-11 and 81-10 were reiterated recently. This same opinion also dealt specifically with whether a lawyer participating in an educational seminar should accept employment from a lay person attending the seminar and developed the following criteria: The lawyer should (1) not advise lay persons that they should obtain the services of a lawyer and then agree to act as such; (2) advise the lay persons that the lawyer may not give individual legal advice during or immediately after the conclusion of a seminar, and (3) state that the lay persons would have to contact the lawyer's office for an appointment. The Committee felt that these steps would insulate the lawyer from activities contrary to Ethical Considerations 2-3, 2-4, 2-5 and 2-9. The Committee also concludes in the same opinion that a presentation at a seminar did not constitute personal contact with a perspective client described in DR 2-104 as long as nothing more than the presentation occurred.

Another unpublished opinion dated September 11, 1991, deals specifically with the issue of direct solicitation to other lawyers for referrals. The Committee concluded that such solicitation did not violate DR 2-104.

In looking to other jurisdictions, we find that many states have considered these issues. Opinion 94-3 issued in Connecticut permits a lawyer to speak at a seminar he or she arranged at the conclusion of which attendees are encouraged to fill out questionnaires to facilitate follow-up by the lawyer. Illinois Opinion 94-4 concludes that a law firm may create a relationship with a health care organization regarding health care advance directives where the health care organization actively assists the law firm in marketing and distribution of advertising for its services. The arrangement included seminars at which attendees were assisted in filling out applications. The law firm would later analyze the applications and prepare appropriate documents.. The health care organization is not permitted to state or imply that the law firm is the only firm that can provide the legal services and the state's advertising rules pertain. There was no compensation between the law firm and the health care organization.

Moving north to Michigan, we find Opinion RI-99 issued in September of 1991 holding that a law firm may co-sponsor a seminar with a local hospital featuring a lawyer as a seminar speaker and setting up a booth outside the seminar room to market the law firm's services. The opinion stated that an attendee who wished to retain the firm must contact its office for appointment.

Ohio has dealt extensively with these matters In Opinion 94-2, it was held that a lawyer may participate in educational seminars on legal issues for the public but may not offer free consultations to attendees, and may not pay the cost of conducting the seminar. In Opinion 94-13, Ohio holds that a lawyer may charge a nominal attendance fee, and may accept legal employment that results from the seminar as long as the lawyer does not use the seminar to highlight his or her professional experience or solicit business. The lawyer may make a general statement of information regarding his or her employment ability and how to get a hold of him. The lawyer may not suggest that an attendee should seek the lawyer's advice although the lawyer may suggest that the attendee seek counsel of the attendee's choice. The lawyer may send letters about the seminar, but they must be in compliance with the state's restrictions on personal contacts to perspective clients. A 1992 opinion issued in Texas (Opinion 489) held that a law firm may develop, sponsor and conduct a seminar targeted at a particular segment of the public if the seminar is educational and not designed for publicity or profit, the seminar is open to both lawyers and non-lawyers, if no advice is given concerning specific problems and if advertising restrictions are complied with. Wisconsin Opinion E-94-4 held that a lawyer may accept as a client someone who chose to consult the lawyer after attending the lawyers presentation at a seminar, that opinion resulting in the withdrawal of a prior contrary opinion.

Thus we find a potpourri of rules and restrictions governing seminar participation by lawyers. We find that Opinion 75-11 is out of step with the approach of other states as well as general practices in the profession and, accordingly, it is withdrawn. We conclude that a lawyer may ethically participate in public seminars sponsored by charitable organizations or for-profit entities where the purpose is both to educate the public and generate business for the sponsoring organization and the lawyer as long as the following criteria are followed:

1. The lawyer may not pay the organization or furnish anything of value in exchange for the lawyer's participation, this in accordance with DR 2-103(A).
2. The lawyer may not render individual legal advice to attendees during or immediately after the seminar.
3. The lawyer may not advise attendees that they need legal advice and then agree to furnish it.
4. In connection with the relationship with the sponsor, the lawyer must be especially mindful of the dictates of DR 5-101 (A) and DR 5-107.

A lawyer must also be mindful of DR 2-104 both in promoting the seminar and during its course. We believe that this disciplinary rule is not violated by the seminar participation itself because the contact is initiated by the persons attending the program.

It should also be pointed out that the prohibition in Opinion 75-11 of designating the lawyer as a specialist is no longer tenable because it is contrary to the United States Supreme Court's holding in Peel v. Illinois Attorney Registration and Disciplinary Commission, 496 U.S. 91 (1990), which prevents states from prohibiting lawyers from advertising their certifications from bona fide private organizations.

With respect to solicitation, we find Opinion 81-10 to be in accordance with DR 2-104. This Committee has no authority to after a disciplinary rule.

CONCLUSION

1. A lawyer does not violate the Code of Professional Responsibility by participating in public seminars sponsored by charitable organizations or for-profit entities where the purpose is to both educate the public and generate business for the sponsor and the lawyer as long as the criteria set forth above are followed.

2. A lawyer violates the Code of Professional Responsibility by socially entertaining non-lawyers and directly soliciting them for the purpose of generating clients and client referrals for estate planning services.

VII. Consumer issues- Theft of Identity

HYPOTHETICAL: You receive a call from an elderly woman who says she has been sued by a collection agency for a credit card account she is not familiar with. She is worried that she is the victim of theft of identity and wants you to defend the lawsuit. During the course of representation you find out that her granddaughter stole her identity to open the account.

Good practice: explain the consequence of what might happen in any course of action

-if you defend based on theft of identity may cause family member to get into trouble

VIII. LAWYERS PRE-EMPTIVE PROTECTION

-Seek advisory opinion in advance if you have time
_call the counsel for discipline's office BEFORE embarking on a course of action
_look at ethical rules and rulings
--current case law in this area